IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

No. ~~945~~ 117

DANIEL MICHAEL MacDONALD, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Ground on Which Jurisdiction of This Court is Invoked.

This case comes to the Court on petition for certiorari. The judgment to be reviewed was entered December 2, 1927. A petition for a rehearing was duly filed, and was denied on January 12, 1928. On April 10, 1928, Mr. Justice Holmes granted (by virtue of Section 8(*a*) of the Act of May 13, 1925) an extension of the time within which the application for the writ

might be made and the record filed to include May 1, 1928.

Statement of the Case.

The petitioner is a British subject, fifty-one years of age. He entered the United States lawfully on September 17, 1920, and established a permanent residence in the city of Boston, where he was joined by his wife and child on September 1, 1921. He has maintained this residence continuously since that time. The petitioner is, and has been since his entry into the United States, in the service of the United Fruit Company, a New Jersey corporation, in the capacity of master of one of its steamships plying between the port of Boston and Central American countries. The vessels which he has thus commanded are of British registry.

On November 30, 1921, the petitioner filed a declaration of his intention to become a citizen of the United States in the United States District Court for Massachusetts. Thereafter, on December 22, 1926, he filed his petition for naturalization in the same court.

The district court denied the petition on the ground that during a part of the five-year period preceding the filing of the petition the petitioner was serving as master of the British vessels mentioned above, plying between the port of Boston and various Central American ports, and the court was of opinion that, on account of the provisions of the proviso contained in the paragraph numbered "seventh" of Section 1 of the Act of May 9, 1918, chapter 69, 40 Stat., 542, 544, petitioner was not a resident of the United States while engaged in such service. The court found that in

every other respect the petitioner was eligible and qualified to become a citizen of the United States. The circuit court of appeals sustained the decision of the district court.

ARGUMENT.

I.

Petitioner is Unquestionably Entitled to Citizenship, Unless the Act of May 9, 1918, Changed the Provisions of Law Theretofore Applicable to Petitioners in His Position.

The only question in this case is whether the petitioner has met the legal requirements of residence necessary for a petitioner for naturalization. The Act of June 29, 1906, chap. 3592, Section 4, provides in this regard as follows:

> "Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that, immediately preceding the date of his application, he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least. * * *"

Under this statute the unbroken rule laid down by the courts was that continuous physical presence in the United States, and in the particular State or Territory, was not required, but that continuous domicile for the statutory period must have been maintained; and that the physical absence of a seaman from his domicile—

whether on a foreign or domestic vessel—did not interrupt the statutory residence required.

United States v. Rockteschell, 208 Fed., 530.
In re Schneider, 164 Fed., 335.
In re Deans, 208 Fed., 1018.
In re Timourian, 225 Fed., 570.
United States v. Jorgenson, 241 Fed., 412.
United States v. Habbick, 287 Fed., 593.
United States v. Dick, 291 Fed., 420.
United States ex rel. Devenuto v. Curran, 299 Fed., 206.
Neuberger v. United States, 13 Fed. (2d), 542.

Thus in *United States v. Rockteschell, supra* (C. C. A., 9th C.), the court considered the specific question whether a seaman who had a residence and domicile in the United States, at which he had been present only at irregular intervals and for comparatively short periods, had maintained the necessary residence for naturalization. It held that he had, saying:

> "As a condition precedent to the right of the respondent to naturalization, it was doubtless necessary for him to show continuous residence in the United States for the period of at least five years; but it is not thought that this requirement is equivalent to, or necessarily implies, continuous physical presence. • • •
>
> "It is familiar knowledge that the word 'reside' is capable of different meanings, and when employed in a statute must be construed in the light of the context and the purpose of such statute; generally, however, it signifies nothing more or less than domicile. Some light is thrown

upon the intent of Congress by the history of the statute. As originally enacted April 14, 1802 (2 Stat., 153, c. 28), the requirement was simply of five years' residence in the United States, and as then construed the term 'residence' meant 'domicile.' *In re an Alien*, Fed. Cas. No. 201*a*. By the amendment of March 3, 1813 (2 Stat., 811, c. 42), the section was made to read as follows:

"'No person who shall arrive in the United States from and after the time when this act shall take effect shall be admitted to become a citizen of the United States who shall not for the continued term of five years next preceding his admission, as aforesaid, have resided within the United States, without being at any time during the said five years out of the territory of the United States.'

"Through the change thus wrought, Congress very clearly evinced its intention of requiring continuous physical presence. But, upon the other hand, the fact that in the revision the clause, 'without being at any time during the said five years out of the territory of the United States,' was omitted, would seem to indicate a purpose again to abandon this requirement."

Likewise, the Circuit Court for the Southern District of New York in *In re Schneider*, *supra*, stated:

"A sailor who has acquired a domicile, which is the sense in which the act uses the word 'residence,' does not abandon it by going to sea. • • •"

II.

Subdivision 7 of Section 4, Added by the Act of May 9, 1918, was a War-time Measure, Applicable Only to Particular Classes of Aliens Therein Designated, and Did not Change the Law Applicable to This Petitioner.

The Act of May 9, 1918, was passed by Congress for the purpose of encouraging certain designated classes of aliens to serve in specified employments at a time during the World War, when the United States was in great need, by making the acquisition of citizenship very much easier if they entered such field of activity. In subdivision 7 (printed in full at the end of this brief) it provided that Filipinos, Porto Ricans, or aliens in the service of the army or navy, marine corps, coast guard, or merchant marine, should not have to prove five years' residence in the United States, as required by the general provisions of the Naturalization Act of June 29, 1906, before obtaining citizenship, but that, if they served for three years in any of the designated branches, they could become citizens. A proviso of subdivision 7 (which the circuit court of appeals has applied to petitioner's application for citizenship) added the following:

> " • • • *Provided further*, That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens cannot secure

residence for naturalization purposes during service upon vessels of foreign registry."

The Circuit Court of Appeals for the Fifth Circuit in the *Nicolich* case, *supra*, stated the scope and purpose of the new subdivision and the proviso as follows:

> "The Act of 1918 was adopted at the height of the World War, without the opportunity for careful consideration usually given to statutes of that character. It was intended to facilitate naturalization rather than to restrict it. The United States was in pressing need of American citizens as watch officers for the merchant fleet that was being rapidly acquired. By subdivision 7, added to the existing law by that act, sailors on American vessels were allowed to file a declaration of intention after three years' service, and to be naturalized immediately, and other classes of persons were given privileges of naturalization they had not theretofore enjoyed.
>
> "A proviso should be narrowly construed and confined to the context of the act in which it appears, and it will not be given an effect repugnant to the clearly expressed intention of Congress (Dollar Savings Bank *v.* U. S., 19 Wall., 227). The proviso above set out was merely declaratory of the existing law and was evidently inserted out of an abundance of caution. To give it the effect contended for, we would have to assume that it was intended to be retroactive and to deprive seamen of the benefits of the naturalization laws they have always enjoyed and which are still enjoyed by all other

persons, quite contrary to the usual attitude of Congress."

The reports of committees of Congress and the explanations by committee members occurring in Congress while the Act of May 9, 1918, was under consideration, definitely show that the purpose of this act was, as stated in the opinion in the *Nicolich* case, not to place any additional limitations or restrictions upon the naturalization of aliens under the provisions of the Act of June 29, 1906, but was to enlarge the right of naturalization and to extend to the classes of aliens specifically described in the Act of May 9, 1918, the opportunity to become citizens of the United States under conditions much more favorable than those extended to aliens generally by the Act of 1906.

Mr. Hardwick, of Georgia, who had the bill in charge before the Senate, explained its scope as follows:

> "Mr. GALLINGER. * * * I simply rose to ask the Senator, because I have not had time to read the bill, precisely what the *modus* is that is prescribed in the bill. Does it, for instance, provide that this legislation is due to the fact that we are in war—that the emergency is because of that fact?"
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> "Mr. HARDWICK. Of course, if the Senator pleases, this is war legislation; but by its terms and necessarily it can apply only to war conditions."
>
> "Mr. GALLINGER. Yes; that is what I wanted to know."
>
> "Mr. HARDWICK. *There would be no change in what would happen ordinarily in peace times;*

but this is an adjustment of our naturalization laws to the war conditions that now confront us."

"Mr. GALLINGER. That is precisely what I wanted explained."

(*Congressional Record*, April 12, 1918, p. 5009.)

Later, Mr. Hardwick, when presenting the bill to the Senate, said:

"I ask the unanimous consent that the Senate shall presently consider the bill (H. R. 3132) to amend Section 2171 of the Revised Statutes of the United States relating to naturalization. I will say, by way of explaining the request, that there are two great purposes sought to be accomplished by this bill: One is to provide for the naturalization of 123,000 soldiers of the United States whom we cannot, with either safety or justice to themselves, send abroad until this is done. The second purpose, although hardly so important and hardly so pressing, is not unimportant, and that is to readjust our naturalization laws to meet war conditions."

(*Congressional Record*, April 16, 1918, p. 5146.)

Mr. Johnson, of Washington, one of the House Committee Conferees, in discussing in the House the conference report adopting the Senate substitute, stated:

"Mr. Speaker, because this bill to amend the Naturalization Laws contains many technical phrases, it is not easy to pick out from its several paragraphs the many beneficial things that

it proposes to do for the unification and general welfare of all the people in the United States, including those aliens who hope to remain here and who are willing to help fight our battle, many of whom are in fact fighting under our flag and in the uniforms of our country, who cannot complete their naturalization without such a measure as this one."

(*Congressional Record*, May 3, 1918, p. 6012.)

Mr. Miller, of Minnesota, while discussing the new right conferred on Filipinos, said:

"You are conferring benefits and privileges by this act. *You are not taking things away.*"

(*Congressional Record*, May 3, 1918, p. 6027.)

Mr. Burnett, of Alabama, Chairman of the House committee conferees, explained to the House that the inclusion of this proviso in subdivision 7 was solely to restrict the privileges of the bill to those serving on American vessels:

"In regard to service on the merchant marine, the bill specifically says it must be the American merchant marine. It has been construed by some of the courts that those who have been serving in the foreign merchant marine may have their residence on that as residence in the United States. Hence, we put that in in order to guard it, so that only those who have served in the domestic merchant marine *are entitled to the privileges of this bill*—those who have served unde the American Flag."

(*Congressional Record*, May 3, 1918, p. 6002.)

Mr. Burnett specifically stated that this proviso clause was incorporated in subdivision 7, so that only those who have served in the domestic merchant marine are entitled to the privileges of "*this* bill." It is submitted that the Chairman's reference to "this bill" shows beyond question that the proviso clause was not a limitation on the Naturalization Laws generally, but was limited in its application to the special privileges granted by the provisions of subdivision 7.

The majority opinion of the circuit court of appeals in the present case gives to this proviso clause the scope and effect of an independent enactment. It ignores all the canons of interpretation. It ignores the spirit and purpose of the enactment.

The opinion apparently centers on the failure of Congress to place the word "such" in front of the word "alien" in the opening clause of the proviso. That the omission of the word "such" in the first clause was an accidental omission is clearly shown by the second clause of the same sentence,—"and *such* aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry."

This Court, in dealing with a similar case involving Section 4 of the Act of 1906, where there was no qualifying or limiting word preceding or following the word "alien," as a consequence of which it was contended that Congress intended to open the doors wide to all aliens, said in *Ozawa v. United States*, 260 U. S., 178, 194:

> "It is the duty of this Court to give effect to the intent of Congress. Primarily, this intent

> is ascertained by giving the words their natural significance, but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. See *Holy Trinity Church v. United States*, 143 U. S., 457; *Heydenfeldt v. Daney Gold Mining Co.*, 93 U. S., 634, 638. * * * It is inconceivable that a rule in force from the beginning of the Government, a part of our history as well as our law, welded into the structure of our national policy by a century of legislative and administrative acts and judicial decisions, would have been deprived of its force in such dubious and casual fashion."

It is submitted that the circuit court of appeals, in reaching its conclusion, completely ignored the spirit and reason of the amendment; it ignored the fact declared on the face of the act, and declared by the proponents of the act, that its purpose was to extend and not to restrict the privilege of acquiring citizenship; it ignored the cardinal canons of construction of a proviso and attributed to Congress an intent and purpose not only repugnant to the general policy established by legislative and administrative acts and by judicial decisions, but also an intent which was contrary to the expressed purpose of Congress in passing this particular act.

The decision of the Circuit Court of Appeals for the First Circuit establishes a class of aliens, otherwise eligible for and entitled to citizenship, who will be forever barred therefrom because of their employment. If this decision is correct, master mariners and officers and engineers of vessels cannot become citizens of the United States and are, therefore, precluded from the United States Merchant Marine because they cannot obtain licenses required by law until they acquire citizenship. (R. S. 4131, U. S. Code, title 46, Sec. 221 *et seq.*) Furthermore, foreign registered vessels owned and operated by citizens of the United States cannot be registered under the laws of the United States unless their existing officers are discharged and new officers, unfamiliar with the owner's business, are engaged. No matter how great the desire of such owners to have their vessels fly the United States flag, it is submitted they may be influenced against the transfer of registry solely because of the hardship which necessarily must be inflicted on loyal employees by such action. The result may well be that the United States Merchant Marine is seriously affected thereby.

The opinion reached by the majority of the circuit court of appeals can be sustained only if a radical change in the long-established principles governing statutory construction is made. Such an innovation, it is submitted, should be introduced, if at all, by this Court and not by the divided decision of an inferior court.

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SUBDIVISION 7 OF SECTION 4 OF THE ACT OF JUNE 29, 1906, AS AMENDED BY THE ACT OF MAY 9, 1918.

"Seventh. Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for reenlistment; or any alien, or any Porto Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, either the Regular or the Volunteer Forces, or the National Army, the National Guard or Naval Militia of any State, Territory, or the District of Columbia, or the State militia in Federal service, or in the United States Navy or Marine Corps, or in the United States Coast Guard, or who has served for three years on board of any vessel of the United States Government, or for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden, and while still in the service on a reenlistment or reappointment, or within six months after an honorable discharge or separation therefrom, or while on furlough to the Army Reserve or Regular Army Reserve after honorable service, may, on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence within the United States if upon examination by the representative of the Bureau of Naturalization, in accordance with the requirements of

this subdivision it is shown that such residence cannot be established; any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States; any alien declarant who has served in the United States Army or Navy, or the Philippine Constabulary, and has been honorably discharged therefrom, and has been accepted for service in either the military or naval service of the United States on the condition that he becomes a citizen of the United States, may file his petition for naturalization upon proof of continuous residence within the United States for the three years immediately preceding his petition, by two witnesses, citizens of the United States, and in these cases only residence in the Philippine Islands and the Panama Canal Zone by aliens may be considered residence within the United States, and the place of such military service shall be construed as the place of residence required to be established for purposes of naturalization; and any alien, or any person owing permanent allegiance to the United States embraced within this subdivision, may file his petition for naturalization in the most convenient court without proof of residence within its jurisdiction, notwithstanding the limitation upon the jurisdiction of the courts specified in Section three of the Act of June twenty-ninth, nineteen hundred and six, provided he appears with his two witnesses before the appropriate representative of the Bureau of Naturalization and passes the preliminary examination hereby required before filing his petition for naturalization in the office of the clerk of the court, and in each case the record of this examination shall be offered in evidence by the representative of the Gov-

ernment from the Bureau of Naturalization and made a part of the record at the original and any subsequent hearings; and, except as otherwise herein provided, the honorable discharge certificate of such alien, or person owing permanent allegiance to the United States, or the certificate of service showing good conduct, signed by a duly authorized officer, or by the masters of said vessels, shall be deemed *prima facie* evidence to satisfy all of the requirements of residence within the United States and within the State, Territory, or the District of Columbia, and good moral character required by law, when supported by the affidavits of two witnesses, citizens of the United States, identifying the applicant as the person named in the certificate of honorable discharge, and in those cases only where the alien is actually in the military or naval service of the United States, the certificate of arrival shall not be filed with the petition for naturalization in the manner prescribed; and any petition for naturalization filed under the provisions of this subdivision may be heard immediately, notwithstanding the law prohibits the hearing of a petition for naturalization during thirty days preceding any election in the jurisdiction of the court. Any alien who, at the time of the passage of this act, is in the military service of the United States, who may not be within the jurisdiction of any court authorized to naturalize aliens, may file his petition for naturalization without appearing in person in the office of the clerk of the court and shall not be required to take the prescribed oath of allegiance in open court. The petition shall be verified by the affidavits of at least two credible witnesses who are citizens of the United States, and who shall prove in their affidavits the portion of the residence that they have personally known the applicant to have resided within the United States. The time of military service

may be established by the affidavits of at least two other citizens of the United States, which, together with the oath of allegiance, may be taken in accordance with the terms of Section seventeen hundred and fifty of the Revised Statutes of the United States after notice from and under regulations of the Bureau of Naturalization. Such affidavits and oath of allegiance shall be admitted in evidence in any original or appellate naturalization proceeding without proof of the genuineness of the seal or signature or the official character of the officer before whom the affidavits and oath of allegiance were taken, and shall be filed by the representative of the Government from the Bureau of Naturalization at the hearing, as provided by Section eleven of the Act of June twenty-ninth, nineteen hundred and six. Members of the Naturalization Bureau and Service may be designated by the Secretary of Labor to administer oaths relating to the administration of the naturalization law; and the requirement of Section ten of notice to take depositions to the United States attorneys is repealed, and the duty they perform under Section fifteen of the Act of June twenty-ninth, nineteen hundred and six (Thirty-fourth Statutes at Large, part one, page five hundred and ninety-six), may also be performed by the Commissioner or Deputy Commissioner of Naturalization: *Provided*, That it shall not be lawful to make a declaration of intention before the clerk of any court on election day or during the period of thirty days preceding the day of holding any election in the jurisdiction of the court: *Provided further*, That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry.

"During the time when the United States is at war no clerk of a United States court shall charge or collect a naturalization fee from an alien in the military service of the United States for filing his petition or issuing the certificate of naturalization upon admission to citizenship, and no clerk of any State court shall charge or collect any fee for this service unless the laws of the State require such charge to be made, in which case nothing more than the portion of the fee required to be paid to the State shall be charged or collected. A full accounting for all of these transactions shall be made to the Bureau of Naturalization in the manner provided by Section thirteen of the Act of June twenty-ninth, nineteen hundred and six."